United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1384

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

ESTELLA NAVAS, MARIO NAVAS, and JOSE RAMIREZ-RIVERA,

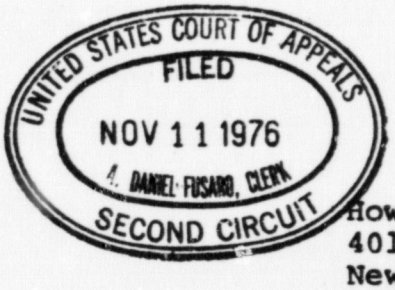
Appellants.

Docket No. 76-1384

BP/S

BRIEF FOR APPELLANTS ESTELLA NAVAS, MARIO NAVAS AND JOSE RAMIREZ-RIVERA

Appeal From A Judgment of Conviction
In The United States District Court
For The Southern District Of New York



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BRIEF FOR APPELLANTS ESTELLA NAVAS,
MARIO NAVAS and JOSE RAMIREZ-RIVERA

Estella and Mario [illegible]as and Jose Ramirez-Rivera appeal from their conviction of July 30, 1976 (Carter, J.) upon a jury verdict of conspiring to import cocaine. Mario, in addition, was convicted of two counts of cocaine possession with intent to distribute, and Estella on one count for the same offense. They all received fifteen-year sentences and a three-year special parole, but Mario's sentence is longer because, unlike Estella, he received no credit for time they both served in New York State custody from October 4, 1974 to February 19, 1976 on related state charges.*

* Technically it worked like this. Judge Carter sentenced Mario to fifteen years on the conspiracy count (Count One), suspending 503 days of state custody. He then sentenced him to 503 days consecutively on Count Two, one of the possession counts. (Cont'd)

Ramirez received credit for his state custody from September 3, 1974. Counsel on this appeal is assigned under the C.J.A.

Neither Mario nor Estella challenges the sufficiency of the Government's evidence. Their principal argument for reversal centers on the legal consequences of the Government's determination in 1974 that it would not then federally prosecute them, although it named them as unindicted co-conspirators in a broad conspiracy indictment filed the day of their arrest, participated in the arrest and initial overnight detention, and claimed they were major figures in that conspiracy. Rather, in a formal agreement between Joint Task Force state and federal prosecutors (the investigation into the case had been a Joint Task Force operation) the Government ceded exclusivity to the State to arrest, indict and confine them, a confinement which lasted a year and a half.* Defendants also urge that the district court used an improper criterion -- that defendants were aliens rather than United States citizens -- in meting out "the most severe [sentences] that I have ever given in my career". The sentences far exceeded those in Bravo I, in some cases to others who were far more culpable, and were imposed without the district court having the benefit of information as to the Bravo I

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* (Cont'd)
He sentenced Estella to fifteen years on Count One, suspended the 503 days in state custody, and gave her the same concurrent sentence on the possession count, resulting in no additional confinement.

* Although his factual situation is slightly different (not, however, in any material consequence) Ramirez relies on this point as well.

sentences. Ramirez alone argues that the evidence failed to establish beyond a reasonable doubt his participation in the conspiracy.

The case was here in June, 1976. Defendants applied for release from jail because trial had not commenced within ninety days of indictment. This Court affirmed the order below denying such release. United States v. Padilla Martinez, Docket No. 76-1236, June 4, 1976. Nothing decided on that occasion is pertinent here. On October 28, 1976 this Court decided United States v. Armedo-Sarmiento, Docket No. 76-1113, following the main trial on the conspiracy. We refer to that case from time to time as Bravo I and this a' Bravo II.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in refusing to dismiss the indictment because of the one and one half year delay in prosecution following the Joint Task Force arrests in September and October, 1974?

2. Whether the district court erred in deciding the Speedy Trial issues without a hearing?

3. Whether the district court was entitled to impose across-the-board fifteen-year sentences based on the fact that defendants were foreigners? This resulted in sentences which were disparate not only within the case itself but with the sentences in Bravo I. There is a further issue of whether the district court failed to consider significant facts and opinions, a point which led this Court to vacate the sentences in United States v. Robin, (October 15, 1976) and United States v. Stein, (October 28, 1976).

4. Whether the district court erred in finding that the Government had met the United States v. Geany, 417 F.2d 1116 (2nd Cir. 1969) standard as to Ramirez; and whether there was error in its refusal to set aside the Ramirez guilty verdict for insufficiency of evidence?

STATEMENT OF FACTS

The trial below was the second in the Southern District of New York of alleged members of the Bravo Group conspiracy, a "massive international narcotics organization which [from 1971 through October 4, 1974] smuggled hundreds of kilograms of cocaine and literally tons of marijuana into the United States from Colombia". Bravo I Appeals Brief for the United States, p. 5. Mario, according to the Government, was a major importer for the Group, as was the Reverend Mejias. (In most of the materials in Bravo I and here this Court will find Mario under the name Mario Rodriguez.)

If the conspiracy was massive, the Government's effort against the Bravo Group was equally massive. In June, 1973 two important couriers, Gomez and Parra, were arrested, charged, and pleaded guilty in the Western District of Texas. That same year the Government indicted (and later convicted) one of the main New York distributors, Edgar Botero Restrepo, in the Southern District of New York. Thereafter, starting in May, 1974 the Government returned no less than six indictments in the Southern District against the Group and various members thereof (exclusive of the one involved here): 74 Cr. 494 (May 16, 1974); 74 Cr. 817 (August 19, 1974); 74 Cr. 910 (September 25, 1974); 74 Cr. 939 (October 4, 1974); 74 Cr. 1128 (November 27, 1974); and finally 75 Cr. 429 (April 30, 1975), on which the Government proceeded to trial in Bravo I.

Operation Banshee

The Bravo II trial focused on the last phase of the conspiracy, lasting from late 1973 to October, 1974. Its activities came to light as a result of "an intensive cooperative investigation by Federal and New York authorities" (Second Circuit Bravo I Slip Opinion, p. 307), code named Operation Banshee.

Banshee's genesis was undercover cocaine buys by New York City police from Lilia Prada. Lilia was supplied by Mario and Estella. These led in turn to a series of New York State Court authorized wiretaps on the phone first of Prada, but then of Mario and Estella and of Armedo-Sarmiento (usually called Mono), another major importer. There were nine wiretaps in all. They lasted nine months. Six of the taps were on Mario and Estella's phone. Between those taps and extensive surveillance (Bravo I Opinion 308), Banshee was astride practically every move of Mario and Estella from January to October, 1974.

Banshee was a Joint Federal-State Task Force effort. Drug Enforcement (DEA) agents were assigned to work with the State (A.152),* and later on State officials assisted in the preparation of the federal indictments (A.123, 160-61). Every pertinent Banshee development was made known to the federal arms

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* "A" references are to the Joint Appendix for appellants. Numbered references, without more, are to the trial transcript. "H" references are to the proceedings on the speedy trial motion which cropped up from time to time in the week before trial while the court was holding a hearing on defendants' motion to suppress evidence seized at the Mejias apartment. (Cont'd)

working on the case (A.113-14, 152).

Division of defendants at the May 14 meeting

On May 14, 1974, Federal and State prosecutors met to formulate and co-ordinate their prosecutorial efforts. Frank Rogers, the Special Narcotics Prosecutor, and Lawrence Hermann of his staff attended from the State side. Bancroft Littlefield, an Assistant in the Southern District, and Charles Clayman, an Assistant in the Eastern District, attended from the Federal side. DEA and New York Police officials were also present. The participants agreed among other things that the State would prosecute certain defendants, namely those charged with substantive offenses, and any co-conspirators it elected to prosecute; the federal Government would prosecute certain others, namely conspirators the State did not prosecute; and that arrests would take place on a co-ordinated basis (A.114-15, 152-53, 156).

From the outset of the discussions Mario and Estella were earmarked as defendants who would be prosecuted solely in the state courts. A formal agreement to this effect was made on September 19, 1974 (A.153-54, 156, 115).* State indictments were in fact filed against them, at least eight against Mario and eight against Estella, six before her arrest and two afterward (A.153).

* (Cont'd)
Other appellants raise in this Court the district court's error in denying that motion.

* The district court examined memoranda of this agreement in camera. We have never seen the memoranda. We shall (Cont'd)

Indictment 74 Cr. 939; the co-ordinated arrests

During August and September, 1974 the Joint Task Force arrested several of the conspirators. The major federal effort, however, occurred on October 4, 1974, when the Government filed 74 Cr. 939 against the defendants implicated by Banshee (A.205). These included the Bravos, Mono, and twenty-six other named defendants. Although the indictment alleged a continuing conspiracy from January 1, 1972 to import drugs from Colombia, all the overt acts were unearthed by the Banshee investigation, and an Assistant's affidavit stated specifically that the indictment was based on the Banshee wiretaps and surveillance (A.194). Estella, Mario and Mejias were named as unindicted co-conspirators (A.206). Mario's sale of cocaine to an agent on February 5, 1974 and his presence at a meeting on March 22, 1974 were the subjects of overt acts 6 and 12 (A.207-08). Mejias was named in overt act 24 (A.209).

Roundup of the federal defendants took place the afternoon and night of October 4. As part of the roundup Mario and Estella were arrested on state indictments. Federal agents participated in the arrest and in maintaining them in custody. At the same time they arrested two other people in

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* (Cont'd)
move at the argument to have the memoranda made available to us, or at least that this Court inspect them.

the Navas apartment, one on an Eastern District narcotics indictment and the other for violations of the immigration laws. Mario and Estella were the only state defendants arrested that night (A.164-65).

Mario and Estella were taken from their apartment to DEA headquarters in Manhattan. Federal agents questioned them there throughout the night about the Bravos and others, showing them pictures and playing tapped conversations. The agents detained them overnight in DEA cells with the other federal defendants. The next day they were turned over to the state for processing (A.123, 165-66).

State proceedings: the Bravo I trial

Mario and Estella were in state prison from October 5, 1974 to February 19, 1976, when the present indictment was returned (A.26).* The State did not try them during this period. Litigation did proceed, however, in the state courts on the motion of Mejias and those arrested with him (Valenzuela, Salazar, Cadena and Padilla) to suppress evidence seized on September 3, 1974, during their arrest. In September, 1975 the State Supreme Court granted the motion (A.102).

One month later the Bravo I trial began before Judge Cannella on indictment 75 Cr. 429. This indictment superseded 939 and two earlier indictments and brought together all the

* Their bail was $2 million. Obviously they could not meet it.

Government's evidence over four years against the Bravo Group (A.194, 217). 75 Cr. 429, as 939, named Mario and Estella (and Mejias) as unindicted co-conspirators (A.218). It cited Mario in six of the overt acts (A.222-25, 230) and Estella in one (A.230). The Bravo I trial concluded in January, 1976 with guilty verdicts against the twelve trial defendants.

The Government then turned to the state proceedings. Since substantially the only evidence against Valenzuela, Salazar, Cadena and Padilla came on the arrest, state court suppression had "jeopardized" the state prosecution. The Government decided therefore to indict them and Mejias federally in order to re-litigate the suppression issue (A.102). Mario and Estella were indicted as well to "clean up" the remaining state cases. They went directly from state prison to a federal jail.

Bravo II

Following her indictment here Estella moved to dismiss, asserting that the Government was chargeable with the state arrest on October 4, 1974, and its failure to proceed for a year and one half thereafter violated her Sixth Amendment rights, Barker v. Wingo, 407 U.S. 514 (1972), or, if considered pre-indictment delay, her Fifth Amendment rights. United States v. Marion, 404 U.S. 307 (1972). The Government urged in opposition (see A.102-03) that it had not collected the evidence necessary to indict her prior to January, 1976. In view of the fact that Mario was one of the

"major importers"; that Banshee had tracked Mario and Estella's every move; that the Banshee wiretap applications repeatedly recited their illegal activities; and that Indictments 939 and 429 named them as co-conspirators and in the overt acts, the Government's argument was sham, and Estella's response so demonstrated.

There began a strange series of events.

First, the district court stated that the speedy trial motion seemed to state no grounds for relief because the Government was entitled "to defer" to state authorities and still pick up the prosecution a year and one half later (H.432, 442). Holding open, however, that facts on federal-state cooperation might be pertinent, it asked for (H.461-64) and received an offer of proof from defendants (A.157). The court then declared that even if the facts in the offer were proven the motion would have to be denied, making a hearing unnecessary (H.980-81).

As a final measure the court requested affidavits setting forth the nature of the Joint Task Force operation (H.1017-19). The Government responded two weeks later with affidavits of Lawrence Hermann and Bancroft Littlefield (A.151, 155), who handled the 1974 indictments. These affidavits confirmed defendants' position that the Government's earlier argument about a delay in prosecution because evidence had not "arrived" or had not been "translated" was a sham. They now revealed for the first time that failure to prosecute resulted solely from the May and September agreement that Mario and Estella would be defendants only in the

State Courts. The Government also submitted in camera a memorandum of that agreement (A.115).

The affidavits were incomplete, inconsistent, and contrary to defendants' offer of proof.* Accepting them at their face, however, (and thereby departing from its earlier position that it would accept defendants' contrary offer of proof to decide the motion), and relying also on the Government's now repudiated position that it lacked the necessary evidence until 1976, the district court denied the speedy trial motion (A.98). It denied the suppression motion as well, refusing to follow the contrary state court decision (A.134).

A four-week trial followed. The jury found all defendants guilty except for a deadlock as to Valenzuela. The court imposed across-the-board fifteen-year sentences on the conspiracy count, justifying these on the ground that defendants were foreigners who had brought in drugs from abroad (A.147).

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* We shall have more to say on that in Point II of the Argument. We note here, however, that the affidavits revealed nothing on why other members of the conspiracy, the Gills and Mono, had been prosecuted by both jurisdictions in seeming contravention of the agreements, but Mario and Estella only by the state.

ARGUMENT

POINT I

Mario and Estella's Speedy Trial Rights Attached on October 4, 1974, When They Were First Arrested. The Delay Which Ensued Thereafter Violated The Sixth Amendment.

Barker v. Wingo, 407 U.S. 514 (1972) sets forth a four-fold inquiry to determine Sixth Amendment violations arising from the Government's delay in prosecution: (i) the length of the delay; (ii) the reason for the delay; (iii) defendant's assertion of his rights; and (iv) prejudice. There is a threshold question: When did the Speedy Trial right attach? Was it October 4, 1974, when the Government named Mario and Estella as co-conspirators and the Joint Task Force arrested them, or February 19, 1976, when the Government formally indicted them in this District?

The Sixth Amendment insists on a speedy trial as an essential complement to society's power to accuse publicly of a crime, and to deprive defendant prior to trial of his liberty. An indictment, information or complaint triggers the right even without an arrest because it is an accusation, and an arrest does the same without a complaint or indictment because it deprives defendant of his liberty. All that is necessary for the right to attach is that defendant "in some way become an 'accused'". United States v. Marion, 404 U.S. 307, 320 (1972). Dillingham v. United States, 423 U.S. 64 (1975).

Once the basis of the right is understood, and examination made not of the form of the arrest but of the substance, there is no question about the outcome. Southern District Indictment 74 Cr. 939 publicly accused Mario and Estella of violating the narcotics laws of the United States.* The day it was filed they were federally confined and federally questioned. Although for the next year and a half they were in state rather than federal facilities, their confinement was pursuant to charges developed in a joint federal-state operation, under an agreement concluded by the arms of the joint agency, and a policy that as to Mario and Estella the actions of New York State were to serve the purposes of both the state and federal agencies.

Put another way, the state and federal government were partners. Although as between themselves they could allocate responsibility to one partner, each received benefits from the actions of the other and each was obliged to bear responsibility for the acts of the other which gave rise to the interests the speedy trial right was designed to preserve. That, we submit, ends the matter, although we address a few of the conceptual mistakes in the opinion below.**

The district court mentioned dual sovereignty (A.108).

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* The Government will not be heard to say this had no consequences for them. Would the Government argue, for example, that Mario and Estella could have omitted references to the indictment in answering on an immigration, employment or other form the question: "Have you ever been accused of a crime?"

** In United States v. Cabral, 475 F.2d 715 (1st Cir. 1973), the First Circuit held that federal speedy trial rights start (Cont'd)

That recognizes power to proceed in the state and federal governments. The issue here does not arise from the federal government's exercise of conceded power but from a deliberate non-exercise of power for eighteen months because proceedings by the state partner were serving the Joint Task Force purposes.

The district court wanted to avoid a requirement that the Government rush headlong into a prosecution merely because there had been a state arrest (A.109-10). This was hardly a worry. When the state prosecutor has kept the DEA fully advised of developments; when there has been "intensive [federal-state] cooperation" in the investigation; when the Government has had a grand jury name defendants as unindicted co-conspirators and describe their activities in overt acts; and when there has been extensive federal presence in the arrest, questioning, and overnight detention, the Government has scarcely been "rushed headlong" into prosecution.

The district court said it might consider the speedy trial argument upon a clear showing that the federal government controlled and directed the state arrest (A.108), another

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** (Cont'd)
when a state officer, arresting on a state larceny charge, also declares that he is holding defendant on weapons possession, a federal offense. In United States v. De-Tienne, 468 F.2d 151 (7th Cir. 1972), the Seventh Circuit held that a state arrest triggers federal speedy trial rights when defendant can be prosecuted in both jurisdictions, and the federal indictment only "gilds the charges" underlying the initial arrest. These authorities also demonstrate that on the overwhelming facts here the speedy trial right must commence when the Joint Task Force roundup on the federal indictment occurs, notwithstanding that formally the arrest of Mario and Estella is on state rather than federal charges. See also Gravitt v. United States, 523 F.2d 1211, 1215 n.6 (5th Cir. 1975).

way of putting its oral statements that the Government could defer to prosecution by the state authorities (A.432). These views evinced a fundamental misunderstanding of the interests the speedy trial right was designed to protect.

Once it is seen that the starting point is October, 1974, not February, 1976, the rest is easy. The eighteen-month delay was well beyond the periods found tolerable when as here the delay was deliberate and inexcusable from the standpoint of Sixth Amendment interests, disposing of Barker inquiries (i) and (iii).* See Dillingham v. United States, 423 U.S. 64 (1975).

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* We hope the Government will not defend the district court's view (and that in the Assistant's first affidavit which produced it) that the lapse of one and one half years was needed for the Government to collect evidence to prosecute Mario and Estella (A.118-19). No less than three full pages of the district court's opinion on the Mejias apartment search (A.137-39) detail evidence of Mario and Estella's illegal activities to the officer who arrested Mejias. That opinion, indeed, relied on Mejias' involvement with Mario ("a known narcotics dealer" A.145) and Estella to hold that the officer had probable cause to arrest Mejias and Salazar, Cadena and Padilla as well (A. 143-45).

The position, moreover, flies squarely in the face of the fact that Mario and Estella were alleged central figures in the conspiracy; that six of the nine Banshee wiretaps were on Mario and Estella's phone; that the wiretap applications themselves contained translations of conversations of Mario and Estella which evidenced their involvement; that extensive surveillance of Mario and Estella had taken place; that the Government presented the wiretap and surveillance evidence to the grand jury to have indictment 939 and later 75 Cr. 429 charge their involvement; that the Government had additional wiretap translations concerning Mario and Estella ready for the Bravo I trial; and that the rest of the Banshee evidence had been at all times available to the Government. In any event, the Hermann and Littlefield affidavits made absolutely clear that the sole cause of the delay was that Mario and Estella were earmarked for state prosecution only. But for that they would have been named defendants in 74 Cr. 939, rather than unindicted co-conspirators.

Even the district court granted that defendants promptly asserted their rights, rejecting the Government's ludicrous contention that Mario and Estella should have demanded their federal indictment before it took place, disposing of Barker inquiry (ii). That leaves only (iv) and as to that defendants were not obliged to show specific respects in which their defense had been impaired or indeed any impairment at all (A.120-21). The "major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense". United States v. Marion, 404 U.S. at 320; Dillingham v. United States, supra (no need to demonstrate "actual prejudice"). Those evils are "oppressive pretrial incarceration" and "anxiety and concern of the accused". Barker v. Wingo, 407 U.S. at 532. If one and a half years in state prison, and for Estella, for example, loss thereby of her one-year-old child to a series of foster homes and physical abuse (A.121), do not fall within the rules of Marion and Barker, it is hard to imagine what does.*

The Sixth Amendment claim therefore was established, and the indictment should have been dismissed on those grounds.**

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* In addition, there were the interferences with their lives caused by 74 Cr. 939 (to which we alluded earlier), an aspect specifically recognized by Barker v. Wingo and United States v. Marion.

** For the foregoing reasons as well defendants' rights under the Southern District Prompt Disposition Rules were also violated.

POINT II

The District Court Erred In Refusing To Hold A Hearing On The Speedy Trial Issue.

On the undisputed facts the district court should have granted the speedy trial motion. No hearing was necessary. But clearly it should not have denied the motion without giving defendants the opportunity through testimony to develop the facts. United States v. Scafo, 470 F.2d 748 (2nd Cir. 1972); United States v. Valot, 473 F.2d 667 (2nd Cir. 1973); United States v. Pollak, 474 F.2d 828 (2nd Cir. 1973).

A few obvious examples make the point. Even under the district court's theory defendants might have prevailed upon "a clear showing of federal intrusion into, and control over state decision-making processes" (A.108). But how were defendants to make such a showing? The federal and state prosecutors had all the facts. The result was that the district court imposed the burden of proof on defendants, and by denying a hearing insured that defendants could not meet it.*

A hearing was especially important because the Government could not be relied upon to disclose the facts. The single most important consideration on these motions was the

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* Defendants proposed to call the principal federal and state prosecutors and the arresting officers. All had been subpoenaed or had been made available voluntarily.

formal agreement of May and September between the prosecutors. The Government did not disclose this agreement in its affidavits responding to the motions or in the extensive oral arguments on the motion during the suppression hearings. The agreement came to light only when as an afterthought the district court asked for affidavits on the nature of the federal-state cooperation.

There were other aspects.

(a) The district court adopted the facts recited in the Hermann and Littlefield affidavits, indeed in haec verba. Those affidavits, however, contained several important inconsistencies and left unanswered more crucial questions than they resolved. For example Hermann asserted an agreement at the May 14th meeting that "the state investigation was most important and would take precedence over existing related federal conspiracy investigations" (A.153). Littlefield omitted this from his version (A.156). Was it Littlefield's view that the state investigation was not more important, and that it would not take precedence, or that this was not agreed at the meeting?

These questions made a difference. At sentencing the Assistant told the court that the Bravo conspiracy represented "the largest [narcotics] organization which certainly I am familiar with and I am told by the agents working on the case with which they have ever become familiar," (4159). The Government's Bravo I brief referred to a "massive international narcotics organization" (p. 5). It is incredible that the United States Government, after all its independent investigative

efforts (A.102, 118) and as late as May, 1974, would have agreed that the state investigation was "most important" and would "take precedence" over the federal investigation. In any event Littlefield's omission on the point warranted further scrutiny.

(b) Hermann and Littlefield stated that the state would prosecute defendants charged with substantive offences* and any conspirators it elected to prosecute, and the federal government, co-conspirators not prosecuted by the New York City prosecutor (A.115). Would the state take every substantive charge? Was it contemplated that there would be any conspiracy charges in the state? If the state prosecuted for substantive crimes, did this preclude all federal charges?

What about the Gills (whose conviction this Court reversed in Bravo I) and Mono (whose conviction this Court affirmed)? They were prosecuted both by the state authorities and by the federal government in Bravo I. Why were Mario and Estella prosecuted only in the state courts while the Gills and Mono were prosecuted in both forums? How did their examples fit within the supposed agreements reached by the prosecutors?

(c) Mario and Estella (and Mejias) asserted that they had been threatened with life sentences under the harsh

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* This meant defendants from whom evidence had been seized so that they could be charged with possession or sales without the need for the Pinkerton v. United States, 328 U.S. 640 (1946) agency theory.

state drug laws if they failed to cooperate with the federal authorities in the federal case. By the same token, with greater plea bargaining flexibility in the state court, cooperation of Mario and Estella could insure them a light sentence -- something the federal authorities could not guarantee (A.172). See United States v. Stein, 2d Circuit, October 28, 1976. Defendants argued that the Government left them to the state as a means of securing their cooperation in the federal prosecution (A.172-73, 190-91). Failure to grant a hearing foreclosed this aspect.

(d) There was the question of the arrest. Mario and Estella were picked up as part of the October 4th roundup of the federal defendants on the federal indictment filed that day. DEA agents questioned them about the federal case, took them to DEA headquarters, and kept them overnight in federal cells with the defendants in 74 Cr. 939 (A.123). There was for example a particularly compelling inquiry as to why Mario and Estella were not arrested on September 3rd, when Mono, Mejias, and four others were taken into custody, but instead were arrested a month later as part of a federal roundup.*

At the very least there should be a remand for proper factual development of the issues.

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* The police arrested Mono in front of Mario's apartment in Queens. They feared Mario might have seen the arrest and alerted Mejias and therefore ordered Mejias' arrest (H.827-28, 832).

POINT III

Pre-Indictment Delay Under The Circumstances Of This Case Violated The Fifth Amendment.

We turn to the district court's rejection of our Fifth Amendment argument (A.122-32).* We need not argue the theoretical issue of whether United States v. Marion, supra, requires both tactical advantage and prejudice or only one (A.124) when there is pre-indictment delay. In almost every instance the tactical advantage the Government seeks prejudices defendant (its very notion bespeaks such prejudice), and this case is no exception. There are no factual issues. For purposes of the motion the district court accepted the facts stated in our offer of proof, recited them in its opinion (A.127, 129-30),** and found them legally insufficient.

That conclusion was error. We have no quarrel with a joint investigation and the cooperation with the federal prosecution rendered by the state. Nor could we quarrel with the fact that the Government left Mario and Estella to the state authorities. It is clear, however, that deferences to the state prosecution had decided advantages for the Government,*** and that those advantages worked at the same time to prejudice severely Mario and Estella. Under these circumstances

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* The Sixth Amendment claim is so strong, we believe this Court will not have to reach the Fifth Amendment issue.

** Albeit incorrectly in several respects. The exact statement of the tactical advantage gained by the Government is found in our offer at A.173-74.

*** These were:
First, it relieved the Government of getting ready the Mario and Estella transcripts. In this fashion, it was freer to work
(cont'd)

even if the Government could not be formally charged with the State arrest, it was chargeable with the kind of pre-indictment delay which sustains a Fifth Amendment claim. United States v. Marion, supra.

POINT IV

The Sentences Must Be Vacated. They Were Not Individualized, Were Disparate to Bravo I, Denied Equal Protection, and Were Imposed Without Consideration Of The Relevant Facts.

The sentences in this case were harsh. The district judge stated his intention to impose a "maximum penalty under the law" and he did -- fifteen years, the maximum confinement for conspiracy.* These were, he said, "the most severe I have ever given in my career" (A.147). Excessiveness in the sentences to most of

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*** (cont'd)
on the Bravo I transcripts and get ready for the Bravo I trial. At the same time, it was in a position to come back to the Estella and Mario transcripts, following the completion of Bravo I with plenty of time to get ready.

Second, it helped the Government in its personal situation with the State prosecutors, who wanted some major defendants to prosecute.

Third, it gave the Government two cracks at the apple. If there was a state conviction, that would end it. If not, the Government could take over.

Fourth, it gave the Government the wedge of the state proceedings to coerce the cooperation of Mario and Estella.

Fifth, it would bring Mario and Estella back to the courts after the Government had the experience of the Bravo I trial and could correct the mistakes made there.

* Substantive counts against some of the defendants are immaterial to this point. The main conviction was for conspiracy.

these appellants would not be enough to overturn them. The severity forms the background, however, for the substantive and procedural errors the district court committed.

First, the district court totally ignored the established rule that sentences must be individualized. Williams v. Oklahoma, 358 U.S. 576 (1959); Williams v. New York, 337 U.S. 247 (1949); United States v. Schwarz, 500 F.2d 1350 (2nd Cir. 1974). It imposed across-the-board fifteen-year sentences for conspiracy regardless of the extent of and reason for a particular defendant's participation in the conspiracy, his prior record, his age, and the other factors in his background which had properly to be taken into consideration. At one point the court stated that it didn't know the different levels of participation (A.149), and what is worse, it didn't even seem to care. The result, for example, was that Estella, who was drawn into the conspiracy because of her husband Mario, and who functioned mainly as an errand girl and message taker, received almost the same sentence as him and Mejias and Rojas when her culpability was nowhere near as great.

Second, the sentences were disparate not only from the standpoint of this case but, equally important, from that of Bravo I. The trial there lasted three months. Judge Cannella heard not just the Banshee phase and most of the proof later used in Bravo I, but the earlier years of the conspiracy as well.

The contrast in results mocks the efforts for equality in sentence. United States v. Wiley, 278 F.2d 500, 503 (7th Cir.

1960); Rubin, From Disparity and Equality of Sentences - A Constitutional Challenge, 40 F.R.D. 55; Coburn, Disparity in Sentences and Appellate Review of Sentencing, 25 Rutgers L.Rev. 207, 208-212 (1971); Seymour, 1972 Sentencing Study for the Southern District of New York, 45 New York State Bar Journal. 163, 166-169 (1972). For example, Mono (Sarmiento) was a defendant in Bravo I. He was easily the most important of the Banshee defendants. He was close to the Bravo Brothers in Columbia. Mono received a fifteen-year sentence. Mario and Mejias, whose participation was no greater, received more time --sixteen and a half years. And the other Bravo II defendants, whose participation was practically non-existent compared to Mono, received the same fifteen years.

Restrepo was another major participant, also with direct connections to the highest echelon of the Bravo Group in Colombia. His sentence in Bravo was also fifteen years; again,less punishment than Mario and Mejias and the same as the Bravo II defendants who were far less culpable.

Then there were the minor Bravo defendants. Leon Velez received five years and Ruben Roldan and Jorge Gonzalez seven years. Except perhaps for Mario and Mejias, the other defendants in Bravo II should not have received harsher sentences than them.

Third, the sole determining factor in the decision to impose maximum sentences, that defendants were not American citizens, was impermissible. The district court was forthright about his position. Defendants were foreigners. They had come

in from abroad and violated our laws. They could expect especially severe penalties, more so than an American citizen guilty of the same violation. Put another way an American citizen, in this district court's view, enjoyed greater freedom to violate the narcotics laws because this was his own country.

The problem with all this is not, as the district judge stated, that he was a "jingoist" (A.147). The problem is that the Constitution says it cannot occur. Aliens are entitled to equal protection of law, no less than citizens. Sugarman v. DuVall, 413 U.S. 634 (1973); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Graham v. Richardson, 403 U.S. 365 (1971).

We arrive finally at the ground which caused this Court to overturn the sentences in United States v. Stein, October 28, 1976 (ten years for stock fraud) and United States v. Robin, October 15, 1976 (thirty years for narcotics); failure of the sentencing court "to consider the significant facts and opinions which were highly relevant to the sentence". (United States v. Stein, Slip Op. p. 228). We have no less a situation here. We have already mentioned that the district judge did not know (or want to know) the different levels of participation among the Bravo II defendants. More than that, however, the district court apparently did not have the slightest idea of the severity of the sentences in Bravo I or what considerations had led to those sentences. The probation report didn't mention them. Neither did the Government at sentencing. While the

district court was not bound by the earlier case, at the very least he was obliged to make it a part of his thinking and enunciate reasons why the elements which went into the sentences there could not serve here. United States v. Stein, Slip Op. p. 225-26.

POINT V

The Speedy Trial Argument Applies As Well To Ramirez. The Government Also Failed To Establish His Participation In The Conspiracy.

A. Speedy Trial

Our Points I, II and III discussed the Speedy Trial issues in terms of Mario and Estella. The grounds apply as well to Ramirez.

Ramirez was apprehended in Queens in September 3, 1974 (2051) in the same arrest as Mono which eventually triggered the search of the Mejias apartment involved in the suppression motion. The arrest was a Joint Task Force arrest. Federal agents were present and participated in the arrest and detention at the scene (2052, 2068-69).*

At the time of the arrest Ramirez was carrying ten $1,000 money orders. The officers knew from the phone taps both before and those which were carried on simultaneously and reported to them in the field, that he was there to meet Mono to deliver the money orders. The officers seized the money

* Testimony at trial about his arrest came from DEA agent Cunniff. Cunniff stated: "I participated in the arrest"(2068); "At one (cont'd)

orders. DEA agent Cunniff transported them to operations control at 26 Federal Plaza (2056).

Mono, as we mentioned, was a central target of Operation Banshee. He was federally indicted on October 4, 1974. The Government named Ramirez as a co-conspirator in its bill of particulars in the Bravo I case (A.100). It presented evidence of the September 3rd arrest and money order seizure at the Bravo I trial. Ramirez, however, was indicted only in the state courts. The September 19th agreement between the state and federal prosecutors designated him as a defendant for state prosecution only (A.153).

Ramirez was in state custody from September 3, 1974, to February 19, 1976, when he was indicted in Bravo II as part of the Government's cleaning up of the state cases after the loss of the suppression motion.

Ramirez, also, was entitled to dismissal of the indictment because of the Fifth and Sixth Amendment and Prompt Disposition Rule violations.

B. Sufficiency of Evidence

The Government's threshold burden was to demonstrate to the trial court by a preponderance of non-hearsay evidence that Ramirez was an actual participant in the venture, who had reached agreement with the other conspirators and acquired a

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* (cont'd)
point I recall him being in my car" (2069); "I and several other persons placed the three individuals under arrest at that location" (2055).

stake in their venture. United States v. Geany, 417 F.2d 1116 (2nd Cir. 1969). The district court held the burden was satisfied because Ramirez had been found with the $10,000 in money orders (3467):

> "Jose Ramirez Rivera was arrested on September 3 with $10,000 -- maybe my amount is not exactly correct but it was money orders of some denomination on his person. He was arrested after having made an appointment with Mono. In view of all the surrounding circumstances involving that, I think that the government has established his participation in the transaction by a fair preponderance of the evidence sufficient to send the matter to the jury."

This, we submit, was not enough. Although Mono used money orders to forward narcotics proceeds to the Bravos, Ramirez' possession and delivery to Mono was not enough to establish even by a preponderance that he was a knowing participant in this narcotics venture, and no other non-hearsay evidence bridged the gap. United States v. Aviles, 274 F.2d 179, 189-190 (2nd Cir. 1960) (defendant Rodriguez); United States v. Reina, 242 F.2d 303, 306 (2nd Cir. 1957) (defendant Valachi); United States v. Santore, 290 F.2d 51, 58, 78-79 (2nd Cir. 1960) (attempt of defendants Tarlentino and Narducci to pick up a large shipment of pure heroin not sufficient to make out participation in conspiracy).

Even if the district court was sustainable under Geany, where the standard was preponderance, it erred in holding that the Government had met the higher standard of reasonable doubt, presented in the post-trial motions. The money orders

themselves could not meet that standard, even when coupled with post-arrest conversations between Ramirez' wife and Estella in which the former expressed fears if the police should search her apartment (3754-55). There was no competent proof that the caller was actually Ramirez' wife or that she was a member of the conspiracy so that her hearsay statements could be binding on him.

CONCLUSION

If the Government had not made the May and September, 1974 agreement ceding jurisdiction, as it were, to the State, Estella Navas would have been a named defendant in 74 Cr. 939. She would have been tried in Bravo I and if convicted would have received a sentence of probably five years and maybe seven. Giving credit for the time since her arrest in October, 1974, she would already be eligible for parole or close to it as for example is Ruben Roldan, one of the 939 named defendants, arrested October 4, who received a seven-year sentence.

Instead she has a fifteen-year sentence, and even with her time served, she has thirteen and one half years and must serve one-third before parole eligibility. Something is obviously wrong. Exactly what, we trust this Brief has demonstrated.

This Court should reverse the convictions below of Mario, Estella and Ramirez. It should order the indictments as to them dismissed with prejudice.

Respectfully submitted,

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